

TURKEY INTRODUCED A NEW DIGITAL TAX ON THE CROSS-BORDER ONLINE ADVERTISING SERVICES

Taxation of digital economy has been an issue of many governments in the recent years. As in many countries, companies active in digital economy have been on the focus of Turkish tax authorities and Turkey had introduced a VAT liability for the non-resident cross-border service providers in 2017.

New VAT obligation stipulated that VAT arising from services provided electronically by those without a residence, workplace, headquarters, or business centre in Turkey to individuals who are resident in Turkey but not VAT taxpayers must be declared and paid by the non-resident electronic service providers.

This time, Turkey introduced a digital tax on the cross-border online advertising services by a Presidential Decree. Published in the Official Gazette dated 19 December 2018, the Presidential Decree (the New Regulation) No. 476 brings a withholding tax liability for payments made for cross-border online advertising services.

The non-resident providers of cross-border online advertising services or to those who act as an intermediary for the provision of such services will fall within the scope of new withholding tax liability, regardless of whether the payee is a taxpayer. The Presidential Decree will be applicable to payments made as of 1 January 2019.

The New Regulation is legally based on the Article 11 of the Tax Procedure Code, which authorizes the President to hold liable the parties to the taxable transaction or the intermediaries to withhold taxes as well as determine different tax rates for business segments, business types, industries and commodity groups, regardless of whether;

- the payee is a resident taxpayer,
- the payer or the intermediary to the payment is obliged to withhold taxes under Turkish tax laws,
- the payment is related to the sale of goods or services,
- the sale of goods or services are electronically accomplished or
- the amount paid can be deducted while determining the tax base.

Based on this legal authorisation, the new Presidential Decree determined the withholding tax rates to be applicable to payments made for cross-border online advertising services. Thus, it is clear that the new regulation brings a digital tax by means of withholding mechanism.

What Actually Does the Presidential Decree Bring?

Taxation of digital economy is in the agenda of G-20 and OECD countries, and according to recent communication of G-20 countries released after G-20 Leaders Summit in Argentina, the parties agreed to find a common solution for the taxation of digital economy by 2020. However, many countries including developed countries also take unilateral measures to tax digital economy related income. Turkey is also following similar approach by introducing new rules.

New regulation introduced by Turkey is indeed a digital tax which aims to tax cross-border advertising service providers. As we observed in other countries, the new regulation mainly targets to tax the Turkey-sourced income derived by the large multinationals such as Google, Facebook, Twitter, Instagram and many others.

However, the new regulation is limited with the taxation of cross-border online advertising services and does not cover other activities in digital economy. Accordingly, withholding tax on the payments made for cross-border online advertising services will be applicable as follows:

- 15% for payments made to real persons (including non-resident individuals) under the Article 94 of the Individual Income Tax Law (the IITL),
- 15% for payments made to non-resident corporate income taxpayers under the Article 30 of the Corporate Income Tax Law (the CITL),
- 0% for payments made to resident corporate income taxpayers under the Article 15 of the CITL.

One important issue that should be stressed at this point is that withholding tax will be applied by the resident tax agents (e.g. corporate bodies, trading companies, joint ventures, associations and foundations, self-employed taxpayers) determined by the Article 94 of the IITL and Article 30 of the CITL.

However, we understand from the new regulation that real persons who are not registered as taxpayer but obtaining online advertising services from the non-residents will not be obliged to withhold tax and remit such taxes to Turkish tax authorities.

This shows that new regulation is not actually imposing tax on all income derived by non-resident online advertising service providers as in today's economy individuals are also benefiting from the online advertising services in the B2C (Business-to-Customers) and C2C (Customers-to-Customers) transactions. For that reason, there still stays a gap within the new regulation.

Evaluation of New Regulation from the Tax Treaties Points of View

We are of the opinion that new regulation does not solve all taxation problems of digital economy in Turkey and is also problematic from a tax treaties perspective.

The advertising service activities are taxable under the Turkish tax legislation; however, in order to have a Turkey-sourced commercial income, a non-resident taxpayer must have a workplace (physical permanent establishment/PE) or a permanent representative (agency permanent establishment) in Turkey, and the earnings must have been obtained at such places or through such representatives.

Based on this, if a foreign online advertising service provider does not have permanent workplace (a physical PE) or a permanent representative (an agency PE) in Turkey, within the context of above explanations, income derived from the sale of such services by a foreign supplier from outside of the Turkey to the costumers in Turkey through digital platforms should not be considered as Turkey-sourced commercial income.

In other words, unless a PE exists in Turkey the sale of online advertising services from abroad should not be considered as a Turkey-sourced income under the current Turkish tax legislation and not be subject to income tax in Turkey as the existing legislation does not cover a virtual PE concept. However, the new regulation disregards this and brings a tax liability for online advertising services of non-residents.

Impact of New Regulation on the VAT Obligations of Non-Resident Online Advertising Service Providers

As mentioned above, VAT legislation introduced last year covers VAT liability arising from provision of electronic services through the internet or an electronic network in B2C transactions and it is applicable as of 1 January 2018 without a revenue threshold.

In this context, it covers only electronic services provided by non-resident suppliers to the individuals who are not VAT taxpayers in Turkey. In terms of inbound sale of electronic services in B2B (Business-to-Business) transactions, existing VAT withholding mechanism is still applicable.

In terms of the new regulation on the VAT obligations of non-resident online advertising service providers, no changes have been made and they are still obliged to declare the VAT through VAT Return No.3 and remit the collected VAT to Turkish tax authorities due to their sales to non-taxpayer individuals residing in Turkey.

However, for online advertising services provided by non-resident service providers, Turkish business customers are still obliged to withhold, declare, and remit the VAT to Turkish tax authorities on behalf of these foreign suppliers.

Take Away

Turkey follows the global trends in terms of taxation of the digital economy. New withholding legislation introduced a sort of digital tax for non-resident advertising service suppliers.

We believe that the new regulation is controversial and contradictory to provisions of tax treaties that Turkey is part of and may result in juridical double taxation for the non-resident online advertising service providers.

Therefore, it is highly advisable that foreign advertising service providers follow the developments, especially secondary legislation to be announced by Turkish tax authorities and take the necessary actions in order not to be subject to tax penalties.



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